

Letter of Findings: 04-20130346
Gross Retail and Use Tax
For the Years 2010 and 2011

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ISSUES

I. Resold or Returned Merchandise – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-2.5-5-8(b); IC § 6-8.1-5-1(c); Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974).

Taxpayer argues that it is not required to pay sales tax – or self-assess use tax – on the purchase of certain items of equipment because the items were purchased for resale to other retailers or were returned to the original vendor.

STATEMENT OF FACTS

Taxpayer represents manufacturers of electronic equipment. Taxpayer buys items of equipment which it uses to demonstrate that equipment to potential purchasers. The Department of Revenue ("Department") conducted an audit of Taxpayer's tax returns and business records. The audit resulted in the assessment of additional sales/use tax. Taxpayer disagreed with the results of the audit and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Resold or Returned Merchandise – Gross Retail Tax.

FINDING

Taxpayer argues that the Department incorrectly assessed sales/use tax on Taxpayer's purchase of tangible personal property which it either returned to the original vendor or resold to one of its customers.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

The Department's audit found that Taxpayer purchased items for which it had not paid sales tax. In those instances, the audit assessed Taxpayer "use" tax.

As stated in the audit report:

The [T]axpayer purchased electronic products to demonstrate and show the potential customers how these items work. There is no statutory exemption for this purchase.

Taxpayer states that some of the items were purchased in order to be resold. Without specifically stating as such, Taxpayer relies on IC § 6-2.5-5-8(b) which provides:

Transactions involving tangible personal property . . . are exempt from state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course, of the person's business without changing the form of the property.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

In applying any tax exemption such as that found in IC § 6-2.5-5-8(b), the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). A statute which provides a tax exemption, however is strictly construed against the taxpayer. Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." Id. at 101.

At the outset, Taxpayer misunderstands the application of IC § 6-2.5-3-2. Taxpayer believes that if a purchased item was eventually resold, then Taxpayer owes no tax on the original purchase. Taxpayer errs because IC § 6-2.5-3-2 imposes use tax on items which are stored, used, or consumed in Indiana. In this case, Taxpayer purchased certain items which it "used" to demonstrate the qualities of those items to its customers. As such, Taxpayer made "use" of the items and the tax becomes due. The subsequent sale of the items is a secondary consideration and does not relieve Taxpayer of responsibility for the use tax because there is no exemption for items which are "used" and then subsequently resold.

That being said, Taxpayer did present information tending to establish that certain items were acquired from one of its suppliers and then were resold to one of Taxpayer's customers without Taxpayer making an intervening "use" of the items. To that end, the Audit Division is requested to review the original assessment and adjust the assessment to the extent that Taxpayer made purchases of \$2,550.05 which are exempt pursuant to IC § 6-2.5-5-8(b).

In addition, Taxpayer presented information which established that certain items acquired from its suppliers were returned to one of the suppliers for either a "credit" or refund. As such, the items were neither used, stored, nor consumed by Taxpayer, and the initial acquisition of the items were not subject to use tax. To that end, the Audit Division is requested to review the original assessment and adjust the assessment to the extent that Taxpayer made purchases of \$5,074.44 which were not subject to use tax under IC § 6-2.5-3-2.

FINDING

Some of the items Taxpayer purchased were "used" by Taxpayer but later sold; the tax on these particular items was properly assessed. Other items were purchased by Taxpayer which were promptly resold to its own customers; these items are not subject to tax because these items were purchased for resale. A third set of items were purchased by Taxpayer but were returned to the seller. This third set of items is not subject to tax.

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